CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 20

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, PETITIONER,

vs.

KENNETH V. BROWNELL, AS RECEIVER OF THE PEOPLES NATIONAL BANK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 30, 1934

CERTIORARI GRANTED MAY 21, 1934

SUPREME COURT OF THE UNITED STATES

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court.

Kenneth V. Brownell as Receiver of the Peoples National Bank and Trust Company
vs.
The Metropolitan Casualty Insurance Company of New York.
} No. 9393 Law.

Be It Remembered that heretofore to wit: at the November Term of said Court, on the 15th day of January, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, to wit:

Comes now the plaintiff by its attorneys, and files complaint in the above entitled cause, which complaint is as follows: (H. I.)

And thereupon there issued out of the office of the Clerk of this Court, a writ of summons for the defendant to the United States Marshal.

Jan. 15, 2

UNITED STATES DISTRICT COURT

Indianapolis Division,

Southern District of Indiana.

9393

The President of the United States of America To the Marshal of the Southern District of Indiana, Greeting:

You Are Hereby Commanded, That you summon Metropolitan Casualty Insurance Company of New York (Jackson K. Landers, Agent, Guaranty Building, Indianapolis) late of your District, if it may be found therein, so that it be and appear within 20 days after service of this summons before the United States District Court for the Southern District of Indiana, at Indianapolis next to answer to Peoples National Bank & Trust Company.

And have you then and there this writ.

Witness, the Honorable Robert C. Baltzell, United States District Judge at Indianapolis this 15th day of January A. D. 1932.

ALBERT C. SOGEMEIER
Clerk.

(Seal)

By THELMA M. RIEBELING
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN.

Southern District of Indiana, } ss.

Received the within writ the 15th day of January, 1932, and executed same upon the within named Metropolitan Casualty Insurance Co. of New York, by reading the same to and within the hearing of, and by delivering a true copy of this writ to Jackson Landers, agent of said company, at Indianapolis, Marion County, Indiana, January 15, 1932, he being the highest representative of said company found in my district.

ALF O. MELOY
U. S. Marshal.

By HARRY E. GATES
Deputy Marshal.

Marshal's Costs:
1 Service $2.00

(Endorsed) No. 9393 United States District Court Southern District of Indiana Indianapolis Division Peoples National Bank & Trust Company vs. Metropolitan Casualty Insurance Company of New York Summons Filed Jan 18 1932 Albert C. Sogemeier, Clerk Returnable twenty days after service Miller & Miller, Attorney for Plaintiff.

3 And afterwards to wit: at the May Term of said Court, on the 22nd day of September, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit: Filed Sept 1932.

Comes now the plaintiff, by its attorneys, and files motion for leave to file amended complaint, which motion is as follows: (H. I.)

And the Court being duly advised grants said motion, and the plaintiff now files amended complaint, which is as follows:

4 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana

Indianapolis Division.

Peoples National Bank & Trust Company, *Plaintiff*
vs.
Metropolitan Casualty Insurance Company of New York, *Defendant.*
No. 9393 At Law.

AMENDED COMPLAINT ON INDEMNITY BOND.

Peoples National Bank & Trust Company, plaintiff, complains of the defendant, Metropolitan Casualty Insurance Company of New York, and for a cause of action alleges as follows:

Clause One.

That this is a suit of a civil nature; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and is wholly between citizens of different states, in this, to wit: that the plaintiff herein is a

national banking corporation organized and existing under the laws of the United States of America and having its principal office and place of business at the City of Sullivan, in Sullivan County, State of Indiana, and in the Southern District of Indiana; and that the defendant is a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office and place of business in the City, County and State of New York;

5 Clause Two.

That on and prior to the 19th day of November, 1928, the plaintiff herein operated its business under the name and style of The National Bank of Sullivan, Indiana; that on or about the 19th day of November, 1928, said The National Bank acquired the assets and business of a certain other banking corporation, organized under the laws of the State of Indiana and having its office and place of business in the City of Sullivan, County of Sullivan and State of Indiana, known as the Peoples State Bank and at about the same time the name of the plaintiff was changed to Peoples National Bank & Trust Company, under which name it has ever since operated and this suit is being prosecuted;

Clause Three.

That the defendant at all times herein mentioned was and is now engaged in the State of Indiana, and elsewhere in the United States, in the business of making contracts of indemnity insurance, including fidelity bonds;

Clause Four.

That on or about the 12th day of March, 1927, said defendant entered into a contract of indemnity insurance with The National Bank of Sullivan, wherein and whereby said defendant was designated as the "Underwriter" and the said bank as the "Insured"; that the form, provisions, terms, conditions and phraseology of said bond were prepared and made solely by defendant and said insured had no part in the preparation or making thereof.

6 That by the terms of said bond said defendant, in consideration of a certain premium required to be paid by said insured, which was duly paid, indemnified said insured against direct loss of money or securities or both in which insured had a pecuniary interest in an amount not exceeding $5,000.00, when such loss occurred, as stated in said bond, "through any dishonest act on the part of any Employee of

Insured." That Section 1 of said bond above referred to reads as follows:

"Definition Of Dishonesty. (1) 'Dishonesty' as used in this instrument includes wrongful abstraction, misapplication or misappropriation and/or any other dishonest, fraudulent or criminal act, wherever committed and whether done by the employee directly or in collusion or connivance with others."

Section 2 of said bond provides as follows:

"Definition of Employee. (2) That the term "Employee', as used herein, embraces all officers and employees of the Insured, except inactive Vice-Presidents and Directors other than officers, wherever they may be located, and whether employed regularly or temporarily."

That on to wit: November 23, 1928, an endorsement was executed by defendant and attached to said bond and
7 made a part thereof, by means of which defendant agreed that the name of said insured, or principal, under said bond had been changed from "The National Bank of Sullivan" to "The National Bank and/or Peoples National Bank of Sullivan, Indiana".

That said bond was designated by defendant as No. A-30199; that said bond was written for a period of one year, was renewed on March 12, 1928, and remained in full force and effect until it was cancelled by plaintiff on or about December 15, 1928.

That subsequent to the cancellation of said bond the original thereof was delivered to the defendant; that said defendant now has the same in its possession; that plaintiff has demanded of defendant that it re-deliver said bond or an exact copy thereof to it, but that defendant has at all times failed and refused so to do; that because of the foregoing plaintiff cannot attach to its complaint an exact copy of said bond.

Plaintiff further alleges that it has obtained a specimen copy of the form on which said bond was written, which, plaintiff is informed and therefore alleges the fact to be, contains provisions identical with those in the original bond as issued; that a copy of said specimen bond is attached hereto, made a part hereof and marked "Exhibit A". That a copy of said endorsement attached to said original bond is attached hereto, made a part hereof and marked "Exhibit B".

Clause Five.

That the plaintiff herein has performed all the terms and conditions of said bond on its part to be performed; that plaintiff discovered losses suffered by it as more particularly hereinafter alleged, which losses occurred by reason of
8 certain forged and worthless notes executed and given to plaintiff subsequent to March 12, 1928 and up to December 15, 1928, within a few days subsequent to the 16th day of January, 1929; that within fifteen days after the discovery of said loss, it notified defendant thereof; that within four months thereafter, and on or about the 12th day of April, 1929, plaintiff furnished defendant with due proof of said loss as in said bond required.

That the notes referred to as causing said loss, and for which proof of loss was duly made, are enumerated in paragraph (b) of Clause Seven of plaintiff's amended complaint.

That in addition thereto, plaintiff suffered certain losses by reason of forged notes, which losses were not discovered at the time said proof of loss hereinabove referred to was furnished defendant; that said loss is in adddition to that referre to in said proof of loss; that certain forged notes were given plaintiff between the date of March 12, 1927 and March 1, 1928; that said notes are more particularly referred to in paragraph (a) Clause Seven of plaintiff's amended complaint.

Plaintiff further alleges that the defendant has waived its right to refuse payment of said loss on the ground that plaintiff has failed to submit proper proofs thereof, by reason of the fact that defendant, in either March or April, 1931, employed certified public accountants, who made an independent examination of the books and records of the plaintiff and the circumstances surrounding such loss to ascertain the extent thereof by reason of said forged notes;

9 Clause Six

That at the time that the name of this plaintiff was changed to that under which it now operates and for several years prior thereto and at the time of the execution of the bond here in suit and at all times covered by said bond, and continuously up to the morning of the 16th day of January, 1929, one Edgar D. Maple was an employee of the plaintiff, occupying the position of Assistant Cashier, Trust Officer and Clerk, was active in the business of said bank, and that dur-

ing said time said Maple had principally in his charge the matter of loans and credits to other banks and to individual customers of plaintiff; that at all of said times the office of said Maple was in the banking rooms of plaintiff in the building known as No. 2 East Washington Street, in Sullivan, Indiana; that on the morning of said 16th day of January, 1929, said Edgar D. Maple came to his death in said Bank as a result of a gunshot wound;

Clause Seven.

Plaintiff further alleges that while said Edgar D. Maple was acting as Assistant Cashier, Trust Officer and Clerk and was in the employ of said plaintiff, and while said bond was in full force and effect, the plaintiff sustained losses within the meaning of said bond which were discovered within the time provided in said bond, of money and securities through the dishonest acts of said Edgar D. Maple while acting alone or in collusion with others, as follows, to wit:

10 (a) That said Maple as such employee, knowingly and dishonestly received from said First State Bank of Shelburn or from Jessup F. Bolinger, its President, accepted on behalf of plaintiff and gave credit therefor to said First State Bank of Shelburn on the books and records of plaintiff as though they were genuine, certain promissory notes which were forged, worthless, wholly invalid and void; that each of said notes were accepted on behalf of plaintiff as aforesaid, between the dates of March 12, 1927, and March 1, 1928; that the aggregate amount of said notes was the sum of $42,238.00; that each of said notes bore interest at the rate of 6% per annum and each matured prior to March 1, 1928; that the name appearing on each of said notes and the amount of each, is as follows:

Name	Amount
C. H. Lloyd	$4,500.00
Wyatt Dix	
Delilah Dix	2,500.00
Shelburn Nash Motors Co.	
W. H. Bolinger	4,500.00
J. P. Brust	200.00
B. O. Buckley	
Bessie Buckley	
O. B. Stark	350.00
Buzard Bros.	

Name	Amount
G. S. Buzard	
J. W. Buzard	1,800.00
Wyatt Dix	500.00
Hud Hill	
Ora E. Hill	300.00
John Hayes	200.00
Fred A. Lane	
Porter Shepherd	1,000.00
Willard Miller	
John W. Miller	625.00
Walter McHugh	
J. W. McHugh	1,500.00
J. W. McHugh	2,500.00
Daisy Newton	
F. W. Newton	2,500.00
Nicholson Bros.	
Calvin Nicholson	1,600.00
Nicholson Bros.	
E. H. Nicholson	
Calvin Nicholson	5,000.00
Calvin Nicholson	500.00
Pierson Allen Lumber Co.	
M. V. Allen	1,500.00
H. A. Stevenson	364.00
O. B. Stark	4,500.00
Z. C. Shield & Son	
John T. Shields	400.00
Henry P. Tuech	
Edward White	300.00
Walter Wyman	
Zena Brown	2,000.00
Pierson Allen Lbr. Co.	
H. V. Allen	1,500.00
Hud Hill	
Ora E. Hill	1,100.00
Robert Davidson	
Oliver Cromwell	499.00
Total	$42,238.00

12 (b) That said Maple as such employee knowingly and dishonestly received from said First State Bank of Shelburn or from Jessup F. Bollinger, its President, accepted on behalf of plaintiff and gave credit therefor to said First State

Bank of Shelburn on the books and records of plaintiff as though they were genuine, certain promissory notes which were forged, worthless, wholly invalid and void; that the dates, forged names of the makers, time and amounts of said notes are as follows:

13 Dates	Names	Time	Amounts
July 16, 1928	Carl Austin	180 days	$200.00
Nov. 30, 1928	Flora Bolinger	180 days	300.00
Aug. 2, 1928	E. C. Bolinger Flora Bolinger	180 days	600.00
Aug. 4, 1928	Harry Banister	180 days	200.00
July 20, 1928	Buzard Bros. G. S. Busard J. W. Buzard	180 days	500.00
Nov. 9, 1928	A. L. Boyer	180 days	2,500.00
July 31, 1928	Roy Benson A. K. Benson	180 days	100.00
Aug. 11, 1928	A. K. Benson	180 days	200.00
July 28, 1928	A. K. Benson	180 days	300.00
Nov. 28, 1928	Gean Claustre	180 days	350.00
July 26, 1928	Oliver Cromwell	180 days	250.00
Nov. 20, 1928	W. H. Coonce David W. Coonce James H. Case	180 days	1,000.00
Aug. 2, 1928	O. D. Clayton John L. Hayes	180 days	300.00
Oct. 7, 1928	W. P. Carey Anna Carey	90 days	2,000.00
Sept. 17, 1928	Fred Cline	120 days	2,000.00
Oct. 5, 1928	J. T. Gaskin & Son J. T. Gaskin	90 days	2,200.00
July 20, 1928	W. E. Gaskins Porter Shepherd R. E. Greenwood	180 days	7,500.00
Nov. 21, 1928	J. T. Gaskins Porter Shepherd	90 days	9,000.00
July 21, 1928	G. P. German	180 days	1,400.00
Dec. 10, 1928	Greenwood Brown R. E. Greenwood Fred Greenwood	180 days	2,500.00
July 23, 1928	Fred Hall Ida Hall	180 days	200.00

14 Dates	Names	Time	Amounts
Sept. 19, 1928	J. L. Hayhurst	180 days	$2,500.00
July 26, 1928	Alfred W. Hill		
	John D. Hill, Sr.	180 days	390.00
Aug. 12, 1928	F. M. Hall	180 days	800.00
Aug. 1, 1928	Ida S. Hamilton	180 days	1,500.00
Aug. 9, 1928	Bert Jones	180 days	1,500.00
July 10, 1928	L. V. Martin		
"	John R. Martin	180 days	500.00
Dec. 1, 1928	L. V. Martin		
	John B. Martin	180 days	1,000.00
July 7, 1928	W. T. Marts	180 days	800.00
July 9, 1928	A. C. Myers		
	Wm. N. Myers	180 days	200.00
Aug. 6, 1928	Daisy Newton	180 days	400.00
June 23, 1928	Diana O'Neil	180 days	1,500.00
July 13, 1928	B. W. Porter		
	Dorre Porter		
	J. T. Gaskins	180 days	1,500.00
Oct. 11, 1928	Max Peterson		
	Roscoe Peterson	180 days	285.00
Oct. 11, 1928	Noah Par	180 days	1,250.00
Aug. 9, 1928	Rosa Riggs	180 days	2,000.00
Oct. 19, 1928	G. G. Robbins	180 days	1,500.00
July 17, 1928	H. V. Stark	180 days	6,500.00
Nov. 26, 1928	C. R. Turner	180 days	2,500.00
Dec. 10, 1928	Elmer Taylor	180 days	400.00
Aug. 7, 1928	Len R. Taylor		
	Flora Taylor		
	W. D. Taylor,		
	(His Mark)	180 days	300.00
Aug. 8, 1928	John R. Taylor	180 days	400.00
Dec. 5, 1928	Ed Weir	180 days	2,000.00
July 23, 1928	T. J. Watson	180 days	300.00
15 July 26, 1928	J. H. Wrork	180 days	$400.00
July 27, 1928	Jos. A. Wardell	180 days	1,000.00
May 25, 1928	Chas. W. Thompson	180 days	3,400.00
	Robert Renick		
	G. D. Renick		500.00
	Robert Renick		
	G. D. Renick		889.78
	Total		$69,814.78

16 That the amounts of the transactions listed and set forth in this Clause Seven of this complaint aggregate the principal sum of $112,052.78, which amount was lost to this plaintiff through the dishonest acts of said Edgar D. Maple as aforesaid, while an employee of this plaintiff and while acting as such employee alone and in collusion with others and while said bond was in full force and effect.

Clause Eight.

That because of the foregoing plaintiff is entitled to recover of the defendant the sum of $10,000.00 with interest thereon at the rate of six per cent. per annum.

Wherefore, plaintiff demands judgment against the defendant in the sum of $10,000.00 with interest thereon from the 12th day of April, 1929, at the rate of six per cent. per annum, costs and all other proper relief in the premises.

CHARLES D. HUNT
MILLER & MILLER
Attorneys for Plaintiff.

17 EXHIBIT A.

Casualty Insurance
Fidelity & Surety
Bonds
Semper Progrediens.

The Metropolitan Casualty Insurance Co. of New York
Chartered 1874
Home Office—55 Fifth Avenue
(A Stock Company)

No. Specimen

hereinafter referred to as the Underwriter in consideration of an annual premium, hereby agrees to indemnify
The National Bank of Sullivan

Insuring Clause

hereinafter referred to as the Insured, against loss through dishonesty on the part of any Employee of the Insured, the amount of insurance on each of such employes being
Five Thousand Dollars ($5,000.00/100).
It Is Further Agreed:

Definition of Dishonesty.

(1) That "Dishonesty" as used in this instrument includes wrongful abstraction, misapplication or misappropriation

and/or any other dishonest, fraudulent or criminal act, wherever commited and whether done by the employee directly or in collusion or connivance with others.

Definition of Employee

(2) That the term "Employee", as used herein, embraces all officers and employees of the Insured except inactive Vice-Presidents and Directors other than officers, wherever they may be located, and whether employed regularly or temporarily.

Liability for Loss Due to One or More of a Group.

(3) That in case a loss is shown to be due to one or more of a group of employees, it shall not be necessary to designate the specific employee causing the loss but the aggregate liability of the Underwriter for any such loss shall not exceed the amount of insurance on one employee.

Occurrence Discovery and Reporting of Loss.

(4) That loss is covered hereunder only if the acts causing such loss occur while this insurance is in force and are discovered and reported to the Underwriter within two (2) years after the termination of this insurance.

Notice and Proof of Loss.

(5) That the Insured shall, as soon as it is reasonably possible, and in any event within fifteen (15) days after learning that loss has been sustained, give the Underwriter notice of loss, and within four (4) months, shall file with the Underwriter an itemized statement of claim, duly sworn to, and shall upon request make available for investigation by the Underwriter all books and other records relating to the claim.

Time for Investigation by the Underwriter.

(6) That the Underwriter shall have two (2) months after presentation of sworn statement of claim within which to verify same by appropriate investigation, during which time no legal proceedings shall be brought against the Underwriter as to that claim, nor may such proceedings be brought at all as to that claim after the expiration of fifteen (15) months from the date of its presentation.

Effective Date; Cancelaltion

(7) That this insurance shall become effective as of the date of this instrument, and shall remain in force until can-

celled; and this insurance shall be deemed cancelled upon the date that may be specified in a written notice of cancellation served by the Underwriter upon the Insured or by the Insured upon the Underwriter. If the notice shall be served
19 by the Underwriter, the date specified shall not be less than thirty (30) days after such service. The Underwriter shall upon demand refund the unearned premium.

Cancellation As to Any One Employee

(8) Discovery of loss on account of any employee shall terminate this insurance as to that employee; and the serving by the Underwriter upon the Insured of notice that it is unwilling longer to be liable for the acts of any employee shall, at the end of fifteen (15) days, terminate this insurance as to that employee.

Disposition of Salvage

(9) That in the event loss on account of any one employee exceeds the amount of insurance on that employee, the Underwriter shall be entitled to participate in any salvage from said employee only after the Insured shall have been fully reimbursed.

Signed, Sealed and Dated at ..... the 12'' day of March, 1927.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

By.....

(The words Good Faith appear in large letters across the face of the bond)

20 EXHIBIT B.

General 25
Casualty Insurance
Fidelity & Surety
Bonds
Semper Progrediens

Chartered April 22nd 1874

The Metropolitan Casualty Insurance Co. of New York.

No. A-30199 $.....

It is hereby understood and agreed that the name of the Principal under bond number A-30199, to which this endorsement is attached, has been changed from The National Bank

of Sullivan, Indiana, to The National Bank and/or Peoples National Bank and Trust Company of Sullivan, Indiana.

This endorsement is attached to and forms a part of bond number A-30199, executed by the undersigned as Surety, on the 12th day of March, 1927.

In Witness Whereof, The Metropolitan Casualty Insurance Company of New York, by its Attorney-in-fact, has affixed its name and caused the seal of said County to be affixed thereto this 23rd day of November, 1928.

THE METROPOLITAN CASUALTY INSURANCE CO.
OF NEW YORK
By JACKSON K. LANDERS
(Seal) *Attorney-in-fact*

ed Sept. 27, 1932.

21 And afterwards to wit: at the May Term of said Court, on the 27th day of September, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant, by its attorneys, and files motion to strike out parts of amended complaint, which motion is as follows:

22 (Caption)

MOTION TO STRIKE OUT PARTS OF AMENDED COMPLAINT.

Defendant moves the court for an order striking out of the amended complaint in this cause the following allegations and each of them:

1. In Clause Five, commencing at line 12, page 5, and ending with line 28, page 5, which allegation is as follows:

"That in addition thereto, plaintiff suffered certain losses by reason of forged notes, which losses were not discovered at the time said proof of loss hereinbefore referred to was furnished defendant; that said loss is in addition to that referred to in said proof of loss; that certain forged notes were given plaintiff between the dates of March 12, 1927 and March 1, 1928; that said notes are more particularly referred to in paragraph (a) Clause Seven of plaintiff's amended complaint.

"Plaintiff further alleges that the defendant has waived its right to refuse payment of said loss on the ground that plaintiff has failed to submit proper proofs thereof, by reason of the fact that defendant, in either March or April, 1931, employed certified public accountants, who made an independent examination of the books and records of the plaintiff and the circumstances surrounding such loss to ascertain the extent thereof by reason of said forged notes;" for the reason that said allegations are irrelevant, and immaterial; the complaint shows on its face that none of said losses was discovered and reported to defendant within two years after the termination of the insurance, as required by Clause 4 of the bond attached as Exhibit "A". The complaint specifically alleges that plaintiff terminated the bond by cancellation on December 15, 1928 and no investigation made in March or April, 1931, more than two years thereafter, could constitute a waiver of the failure to discover and report within the said period of two years; moreover, the complaint does not even allege that said losses were discovered by defendant as a result of the alleged examination.

2. All of paragraph (a) Clause 7, commencing at line 1, page 7 and ending at line 12, page 9, which reads as follows: "That said Maple as such employee, knowingly and dishonestly received from said First State Bank of Shelburn or from Jessup F. Bolinger, its President, accepted on behalf of plaintiff and gave credit therefor to said First State Bank of Shelburn on the books and records of plaintiff as though they were genuine, certain promissory notes which were forged, worthless, wholly invalid and void; that each of said notes were accepted on behalf of plaintiff as aforesaid, between the dates of March 12, 1927, and March 1, 1928; that the aggregate amount of said notes was the sum of $42,238.00; that each of said notes bore interest at the rate of 6% per annum and each matured prior to March 1, 1928; that the name appearing on each of said notes and the amount of each, is as follows:

Name	Amount
C. H. Lloyd	$4,500.00
Wyatt Dix	
Delilah Dix	2,500.00
Shelburn Nash Motors Co.	
W. H. Bolinger	4,500.00
J. P. Brust	200.00
B. O. Buckley	

Name	Amount
Bessie Buckley	
O. B. Stark	350.00
Buzard Bros.	
G. S. Buzard	
J. W. Buzard	1,800.00
Wyatt Dix	500.00
Hud Hill	
Ora E. Hill	300.00
John Hayes	200.00
Fred A. Lane	
Porter Shepherd	1,000.00
Willard Miller	
John W. Miller	625.00
Walter McHugh	
J. W. McHugh	1,500.00
J. W. McHugh	2,500.00
Daisy Newton	
F. W. Newton	2,500.00
Nicholson Bros.	
Calvin Nicholson	1,600.00
Nicholson Bros.	
E. H. Nicholson	
Calvin Nicholson	5,000.00
Calvin Nicholson	500.00
Pierson Allen Lumber Co.	
W. V. Allen	1,500.00
H. A. Stevenson	364.00
O. B. Stark	4,500.00
Z. C. Shield & Son	
John T. Shields	400.00
Henry P. Tuech	
Edward White	300.00
Walter Wyman	2,000.00
Zena Brown	
Pierson Allen Lbr. Co.	1,500.00
H. V. Allen	
Hud Hill	1,100.00
Ora E. Hill	
Robert Davidson	499.00
Oliver Cromwell	
Total	$42,238.00"

for the reason that said allegations are immaterial and irrelevant; that the notes referred to involve the same losses referred to in the allegations sought to be stricken out in Specification 1 of this motion, and it affirmatively appears from the amended complaint that such losses were not discovered and reported to defendant within two years after the termination of said bond; that no examination made after the expiration of said two-year period could constitute a waiver thereof; and that no recovery can be had for said losses or any of them under the allegations of the amended complaint and the provisions of the bond sued on;

Wherefore, defendant prays that the foregoing motion be sustained.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for the Defendant.

26 And afterwards to wit: at the May Term of said Court, on the 2nd day of November, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered N 1932.

Come now the parties by their respective attorneys, and the defendant's motion to strike out parts of plaintiff's amended complaint, is now submitted to the Court, and the Court being duly advised, orders that said motion be and the same is hereby sustained.

27 And afterwards to wit: at the November Term of said Court, on the 18th day of November, 1932, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant, by its attorneys, and files demurrer to amend complaint, which demurrer is as follows:

Nov. 18, 2. 28 • • (Caption) • •

DEFENDANT'S DEMURRER TO AMENDED COMPLAINT.

Defendant in the above entitled cause demurs to the amended complaint in said cause, and as ground for demurrer says that said complaint fails to state facts sufficient to constitute a cause of action against defendant.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for Defendant.

MEMORANDUM OF GROUNDS.

1. The record shows that this action was commenced on January 15, 1932.

2. The amended complaint shows on its face that the claim sued on was presented to the defendant on or be-
29 fore April 12, 1929, more than fifteen months, and, in fact, almost three years prior to the commencement of the action.

3. Paragraph 6 of the bond sued on provides that no proceedings shall be brought as to a claim after the expiration of fifteen months from the date of its presentation.

4. The above provision limiting the time of commencing action to fifteen months after the date of the presentation of the claim provides a reasonable period of time for the commencement of the action, and is a valid contractual stipulation.

5. In so far as Section 9139 Burns' Ann. Stat. 1926 has been or may be construed to render such a provision invalid where the insurance company is a foreign one, and the limitation is for a period of less than three years, such statute denies to foreign insurance companies the equal protection of the laws in contravention of the 14th Amendment to the Constitution of the United States, and is invalid.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for Defendant.

30 And afterwards to wit: at the November Term of said Court, on the 27th day of January, 1933, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered Jan. 1933.

Come now the parties by their respective attorneys and the defendant's demurrer to the plaintiff's amended complaint is now submitted to the Court, and the Court being duly advised orders that said demurrer be and the same is hereby overruled, to which ruling of the Court said defendant excepts.

31 And afterwards to wit: at the November Term of said Court, on the 28th day of February, 1933, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Feb. 2 1933.

Comes now the defendant by its attorneys and files answer to the plaintiff's amended complaint, which answer is as follows:

32 • • (Caption) • •

DEFENDANT'S ANSWER.

For answer to the amended complaint in the above entitled cause, defendant says: That the bond sued on and attached to the amended complaint as Exhibit A provides that no proceedings may be brought as to any claim after the expiration of fifteen months from the date of its presentation. That the claims sued on were presented to the defendant by plaintiff on or about the twelfth day of April, 1929. That no proceedings were brought with reference thereto until the commencement of this action on the fifteenth day of January, 1932. That during all of said time defendant has been duly qualified and admitted to transact business in the State of Indiana as an underwriter of policies of casualty insurance and fidelity and other surety bonds and has during all of said time been engaged in transacting such business throughout the State of Indiana, and has during all of said time had

agents in practically every county of said state upon whom service of process against defendant could have been
33 made, and has maintained a branch office for the management of all of defendant's business in the State of Indiana at the City of Indianapolis, Marion County, Indiana. Defendant further says that under the laws of the State of Indiana, corporations organized under the laws of the State of Indiana engaged in exactly the same business as defendant, and competing with defendant, are permitted to insert in their policies of insurance and fidelity bonds provisions limiting the time within which actions must be commenced upon said policies and bonds by the obligees thereof to periods of one year after the occurrence of a loss, or less, and that such provisions are valid and binding under the laws of said state, and that no recovery may be had upon said policies of insurance and fidelity bonds except by the commencement of an action within such period, unless waived in some manner by said companies. That Sect. 9139, Burns' Ann. Stat. 1926, being Sect. 6 of Ch. XV of the Acts of 1865, special session of the Acts of the General Assembly of Indiana, has been construed by the courts of the State of Indiana as prohibiting the insertion of such a provision where the period fixed is less than three years, where the company issuing such policy of insurance or bond is incorporated under the laws of a state other than the State of Indiana, and has been admitted to transact its business in the State of Indiana as a foreign corporation. That such statute so constitutes an unreasonable and arbitrary discrimination against this defendant and all other companies organized under the laws of states other than Indiana and transacting a casualty insurance and fidelity bond business in the State of In-
34 diana, and imposes burdens not imposed upon Indiana corporations transacting the same kind and class of business, and denies to defendant and others similarly situated the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. That by reason thereof said statute of the State of Indiana is invalid and void and cannot and does not invalidate the provisions of the bond sued on. That by reason of the failure of plaintiffs to commence this action within the time limited in said bond, recovery of all claims sued on in this action was forever barred and any liability of defendant therefor wholly discharged.

Wherefore, defendant prays judgment that plaintiff take

nothing by its complaint; that defendant recover the costs of this action, and for all other proper relief.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for the Defendant.

35 And afterwards, to wit: at the November Term of said Court, on the 4th day of March, 1933, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Filed Mar. 1933.

Comes now the parties by their respective attorneys and the plaintiff files its verified motion to substitute Kenneth V. Brownell, Receiver of Peoples National Bank & Trust Company, as party plaintiff, which motion is in the words and figures following, to wit:

36 * * (Caption) * *

MOTION TO SUBSTITUTE PARTY PLAINTIFF.

Comes now the plaintiff and shows to the Court that subsequent to the commencement of this action Kenneth V. Brownell has been duly appointed Receiver of the plaintiff and that by reason thereof said Brownell should be substituted as party plaintiff.

Wherefore, defendant moves that Kenneth V. Brownell, Receiver of Peoples National Bank & Trust Company, be substituted as party plaintiff.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

37 State of Indiana } ss:
County of Marion }

SIDNEY S. MILLER, being first duly sworn, deposes and says:

That he is one of the attorneys for plaintiff and as such is authorized to make this affidavit; that he has read the foregoing motion and that the facts therein are true.

SIDNEY S. MILLER

Subscribed and sworn to before me this 3rd day of March, 1933.

My commission expires April 4, 1933.

HILDRETH J. WORKMAN
Notary Public.

(Seal)

ered Mar. 4, 933.

38 (Entry for Mar. 4, 1933, Continued)

And said motion is now presented to the Court, and the Court being duly advised in the premises, sustains the same and orders that said Kenneth V. Brownell, Receiver of Peoples National Bank & Trust Company, be and he is hereby substituted as party plaintiff.

Comes now the plaintiff and files his demurrer to defendant's answer to plaintiff's amended complaint, which demurrer is in the words and figures following, to wit:

d Mar. 4, 933.

39 • • (Caption) • •

PLAINTIFF'S DEMURRER TO DEFENDANT'S ANSWER.

The plaintiff demurs to defendant's answer to plaintiff's amended complaint on the ground that said answer does not state facts sufficient to constitute a defense to said amended complaint.

Plaintiff attaches hereto and makes a part hereof his memorandum in support of said demurrer.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

40 MEMORANDUM.

Defendant's demurrer is insufficient to state a defense to plaintiff's complaint in each of the following particulars, to-wit:

1. That plaintiff's action was filed herein within three years after proofs of loss were furnished by plaintiff to defendant;

2. That the provision in the bond sued on, which was exe-

cuted by the defendant, providing that an action shall not be brought on any claim thereunder after the expiration of fifteen months from the date of its presentation, is void under the laws of the State of Indiana;

3. The Legislature of Indiana has the legal right to specify under what conditions a foreign corporation can transact business in said state;

4. That the provisions of Sec. 9139 Burns Revised Statutes, 1926, being Sec. 6 of Chap. 15 of the Acts of 1865, Special Session of the General Assembly of the State of Indiana, and the decisions of the courts of said state, do not constitute an unreasonable and arbitrary discrimination against this defendant and other foreign corporations transacting a casualty insurance and fidelity bond business in the state of Indiana;

5. That said statute does not deny to the defendant or other corporations similarly situated, the equal protection of the laws in controvention of the 14th Amendment to the Constitution of the United States.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

41 (Entry for March 4, 1933 Continued) Entered Ma 1933.

And said demurrer is now submited to the Court, and the Court being duly advised orders that said demurrer be and the same is hereby sustained, to which ruling of the Court said defendant at the time excepts, and refuses to answer over, and elects to stand on the Court's ruling on defendant's demurrer to plaintiff's amended complaint, and on the Court's ruling on plaintiff's demurrer to defendant's answer to plaintiff's amended complaint, and refuses to plead further.

Upon said defendant's refusal to plead further the Court now enters judgment for plaintiff under the allegations of said amended complaint and against defendant in the sum of $6113.33 and costs.

It Is Therefore Ordered, Adjudged and Decreed by the Court that plaintiff have and recover of the defendant the sum of $6,133.33 and his costs laid out and expended in the sum of $.....

42 (Further Entry for March 4, 1933)

Come Now the parties, by their respective attorneys, and the defendant now files its petition for appeal and also files it assignment of errors, which are respectively as follows:

1 Mar. 4, 33. 43 • • (Caption) • •

PETITION FOR APPEAL.

To the Honorable Robert C. Baltzell, Judge of the District Court of the United States, for the Southern District of Indiana, Indianapolis Division.

Comes Now The Metropolitan Casualty Insurance Company of New York, petitioner herein, and defendant in said cause, by its attorneys, and respectfully shows to the Court that on the 4th day of March, 1933, a final judgment was entered against your petitioner upon its election to stand on the court's ruling on its demurrer to the plaintiff's amended complaint and on the court's ruling on the plaintiff's demurrer to its answer and its refusal to plead or answer further. The above named defendant, feeling itself aggrieved by the said rulings and the judgment so rendered and entered in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it asks that its appeal be allowed and that citation be issued, as provided by
44 law, and that a duly authenticated transcript of the record and proceeding herein may be transmitted forthwith to said United States Court of Appeals for the Seventh Circuit, under the rules of such court in such cases made and provided.

And your petitioner, defendant herein, further asks that the proper order relating to the security required of it be made, and desiring to supersede the execution of the judgment, your petitioner here tenders bond in such amount as the court may require for such purpose, and asks that with the allowance of the appeal a supersedeas be issued.

NOEL, HICKAM, BOYD & ARMSTRONG,
Attorneys for Defendant.

45 • • (Caption) • • Filed Mar. 1933.

ASSIGNMENT OF ERRORS.

Comes Now The Metropolitan Casualty Insurance Company of New York, defendant in the above entitled cause, and shows that in the determining of and judgment of said cause, manifest errors were committed to the prejudice of said defendant in the following particulars and each of them, to-wit:

(1) The District Court erred in overruling the demurrer to the plaintiff's amended complaint herein.

(2) The District Court erred in sustaining the plaintiffs demurrer to defendant's answer to the amended complaint herein.

(3) The District Court erred in rendering judgment against the defendant upon its election to stand upon the court's rulings on the defendant's demurrer to the amended complaint and on the plaintiff's demurrer to defendant's answer to the amended complaint and upon defendant's refusal to plead or aswer further.

Wherefore, defendant prays that the judgment of said court be in all things reversed with directions to sustain the demurrer to plaintiff's complaint and overrule demurrer to defendant's answer, and for all other proper relief.

NOEL, HICKAM, BOYD & ARMSTRONG,
Attorneys for Defendant.

46 (Further Entry for March 4, 1933 Continued)

The defendant having filed its petition for appeal accompanied by an assignment of errors in the above cause, and it appearing to the court that due notice of this proceeding has been given to the plaintiff,

It Is Ordered that an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the judgment heretofore entered in this cause on the 4th day of March, 1933, be, and the same is hereby allowed on the filing with the clerk of this court by said defendant of a good and sufficient bond in the sum of Seven Thousand Five Hundred Dollars ($7500) conditioned that if said defendant shall prosecute said appeal to effect and answer in damages and costs if it fails to make said appeal good, then said obligation will be void, otherwise to remain in full force and effect.

And the defendant now files its Appeal Bond with The Commercial Casualty Insurance Company of Newark, New Jer-

sey, as surety thereon, which said bond and surety are approved by the court and which bond is in the words and figures following, to wit:

Mar. 4, 1933. 47 • • (Caption) • •

APPEAL BOND.

Know All Men by These Presents that we, The Metropolitan Casualty Insurance Company of New York, as principal, and The Commercial Casualty Insurance Company of Newark, New Jersey, as surety, are held and formally bound unto Kenneth V. Brownell, as Receiver of the Peoples National Bank and Trust Company, plaintiff and appellee in the above entitled cause, in the sum of Seven Thousand Five Hundred Dollars ($7500), to be paid to the said Kenneth V. Brownell as Receiver of the Peoples National Bank and Trust Company, for the payment of which sum well and truly be made, we bind ourselves, our heirs and assigns, jointly and severally by its presents.

Sealed with our seals, and dated this 4th day of March, 1933.

Whereas, the above named The Metropolitan Casualty Insurance Company of New York has prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit to reverse the judgment of the District Court of
48 the United States for the Southern District of Indiana, Indianapolis Division, which said judgment was rendered in said cause on the 4th day of March, 1933;

Now, Therefore, it is a condition of this obligation that if the above named The Metropolitan Casualty Insurance Company of New York shall prosecute said appeal to effect and answer in damages and costs if it fails to make said appeal good, then said obligation will be void, otherwise to remain in full force and effect.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK,

Principal

By JACKSON K. LANDERS (Seal)

Attorney in fact.

THE COMMERCIAL CASUALTY INSURANCE COMPANY,

Surety

By JACKSON K. LANDERS (Seal)

Attorney in fact.

49 (Further Entry for March 4, 1933 Continued) Entered M 1933.

And the said bond having been filed and approved by this court, all further proceedings in this court on said judgment shall be and they are hereby suspended until the determination of said appeal by said United States Circuit Court of Appeals for the Seventh Circuit; and defendant also files praecipe for transcript for use on appeal, which praecipe is in the words and figures, following:

50 • • (Caption) • • Filed Mar. 1933.

PRAECIPE.

To the Clerk of the District Court of the United States for the Southern District of Indiana:

You will please prepare and certify to the transcript of the above entitled cause for appeal to the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to law, and include therein the following:

(1) The amended complaint;
(2) Marshal's return of service;
(3) Motion to strike out parts of the amended complaint;
(4) Entry sustaining motion to strike out parts of the amended complaint;
(5) Defendant's demurrer to the amended complaint;
(6) Entry overruling defendant's demurrer to the amended complaint;
(7) Defendant's answer;

51 (8) Plaintiff's motion for substitution of parties plaintiff;
(9) Entry substituting parties plaintiff;
(10) Plaintiff's demurrer to defendant's answer to amended complaint;
(11) Entry sustaining demurrer to defendant's answer to amended complaint;
(12) Entry showing defendant's election to stand on the court's ruling on defendant's demurrer to plaintiff's amended complaint and on the court's ruling on plaintiff's demurrer to defendant's answer to plaintiff's amended complaint and defendant's refusal to plead further;
(13) Judgment and entry;
(14) Defendant's petition for appeal;
(15) Defendant's assignment of errors;

(16) Order allowing appeal and approved appeal bond and surety;
(17) Appeal bond;
(18) Citation and proof of service thereof;
(19) This praecipe;
(20) All entries concerning filing or entry of the above mentioned papers or orders, and exceptions and rulings.

NOEL, HICKAM, BOYD & ARMSTRONG
Attorneys for Defendant.

Service of the above praecipe and receipt of a copy thereof and hereby acknowledged, this 4th day of March, 1933, at Indianapolis, Indiana.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Plaintiff.

56 United States of America
Southern District of Indiana } ss:
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of *Kenneth V. Brownell as Receiver of The Peoples National Bank and Trust Company* v. *The Metropolitan Casualty Insurance Company of New York*, No. 9393 Law, according to the praecipe filed March 4, 1933, now remaining among the records of said Court in my office.

I further certify that the original Citation has been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 22nd day of March, 1933.

ALBERT C. SOGEMEIER
(Seal) *Clerk, United States District Court, Southern District of Indiana.*

52 (Further Entry for March 4, 1933 Continued).

And the defendant also files citation duly acknowledged by the plaintiff, which said citation is in the words and figures, following, to wit:

53 * * (Caption) * *

CITATION ON APPEAL.

Filed Mar. 4, 1933.

To Kenneth V. Brownell, As Receiver of the Peoples National Bank and Trust Company, Greetings:

You are hereby notified that in a certain action at law in the United States District Court of the United States, for the Southern District of Indiana, Indianapolis Division, wherein you, Kenneth V. Brownell, as Receiver of the Peoples National Bank and Trust Company, are plaintiff, and The Metropolitan Casualty Insurance Company of New York, is defendant, an appeal has been taken by the said defendant to the United States Circuit Court of Appeals for the Seventh Circuit, from the judgment rendered against said defendant in favor of said plaintiff in said United States District Court; on the 4th day of March, 1933.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit, to be held in the City of Chicago, thirty (30) days after the date of this citation, to show cause, if any there
54 be, why the aforesaid judgment appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, this 4th day of March, 1933.

ROBERT C. BALTZELL
Judge of the District Court of the United States for the Southern District of Indiana.

We hereby acknowledge service of the above citation this 4th day of March, 1933, and receipt of copy thereof.

CHARLES D. HUNT
MILLER, MILLER & JEFFREY
Attorneys for Kenneth V. Brownell, As Receiver of The Peoples National Bank and Trust Company.

[fol. 1] At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

vs.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

And on, to-wit: On the twenty-eighth day of March, 1933, there was filed in the office of the clerk of this court an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1932

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY et al.

vs.

KENNETH V. BROWNELL, as Receiver, etc.

The Clerk will enter *my* appearance as counsel for the appellant.

James W. Noel, Hubert Hickam, Alan W. Boyd, Robert D. Armstrong, 130 E. Washington St., Indianapolis, Ind.

Endorsed: Filed March 28, 1933, Frederick G. Campbell, Clerk.

[fol. 2] And afterwards, to-wit: On the sixteenth day of May, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for Appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1932

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

vs.

KENNETH V. BROWNELL, as Receiver, etc.

The Clerk will enter *my* appearance as counsel for the appellees.

Charles D. Hunt, Sidney S. Miller, 1356 Consolidated Bldg., Indianapolis, Indiana.

Endorsed: Filed May 16, 1933, Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-Eighth.

[fol. 2½] And afterwards, to-wit: On the twenty-second day of November, 1933, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 22, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge

4969

METROPOLITAN CASUALTY INSURANCE COMPANY

vs.

KENNETH V. BROWNELL, as Receiver, etc.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Alan W. Boyd, counsel for appellant, and by Mr. Sidney S. Miller, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twelfth day of January, 1934, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

[fol. 3] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1933, JANUARY SESSION, 1934

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant,

vs.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company, Appellee

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

January 12, 1934

Before Evans, Sparks, and FitzHenry, Circuit Judges

FITZHENRY, Circuit Judge:

This action was brought upon a bond, executed by appellant whereby it agreed to indemnify the Peoples National Bank and Trust Company to the extent of $5,000 for

losses occurring by reason of the dishonesty of any employe, to recover the full penalty of the bond for losses alleged to have occurred by reason of the dishonesty of the cashier of said bank. Appellant demurred to the amended complaint, which demurrer was overruled, and it thereupon filed an answer, to which a demurrer of appellee was sustained. Appellant elected to stand upon its pleadings and refused to plead further, and the court thereupon entered a judgment for appellee for the full penalty of said bond with interest, from which judgment this appeal is taken. The errors relied on arise out of the rulings of the court on the demurrer to the amended complaint and the demurrer to the answer, to each of which rulings the appellant duly excepted.

[fol. 4] The amended complaint alleges in substance that on or about the 12th day of March, 1927, the appellant, in consideration of an annual premium, executed the bond in question, by the terms of which it agreed to indemnify the Peoples National Bank and Trust Company, of which appellee is receiver, to the extent of $5,000 for any losses resulting from the dishonesty of any employee of said bank. Said bond remained in force until December 15, 1928, at which time it was cancelled by the bank. During the years 1927 and 1928 while the bond was in force, losses are alleged to have occurred through the dishonesty of one Edgar D. Maple, cashier, in receiving notes, from the president of another bank, which he knew to be forged and for which he gave full credit on the books of the bank. The losses for each year exceeded the penalty of the bond. The 1927 losses were eliminated from the amended complaint by a motion to strike out all allegations with reference to such losses, which was sustained. The losses for the year 1928 are alleged to have been discovered within a few days subsequent to January 16, 1929. It is further alleged that within fifteen days thereafter the bank notified appellant of the loss and within four months thereafter, on April 12, 1929, furnished appellant due proof of loss in accordance with the terms of the bond.

The bond sued on contains, among others, the following provisions:

"Time for Investigation by the Underwriter.

"(6) That the Underwriter shall have two (2) months after presentation of sworn statement of claim within

which to verify same by appropriate investigation, during which time no legal proceedings shall be brought against the Underwriter as to that claim, nor may such proceedings be brought at all as to that claim after the expiration of fifteen (15) months from the date of its presentation."

This action was commenced January 15, 1932, more than fifteen months, and almost three years, after the presentation of the claim.

Appellant contends the action was not commenced within the time limited by the terms of the bond. Appellee contends, and the court held, that said provision requiring the commencement of the action within fifteen months after the presentation of the claim is rendered invalid by Section 9139 (Burns' Ann. Stat. 1926. Acts 1865, p. 105) of the Statutes of Indiana, providing as follows:

[fol. 5] "9139. (4803) Conditions forbidden—6. No such insurance company shall insert any condition in any policy hereafter issued requiring the insured to give notice forthwith, or within the (a) period of time less than five days of the loss of the insured property; * * * and any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, and *no condition or agreement not to sue for a period of less than three years shall be valid.*"

As construed by the Supreme Court of Indiana, this statute purports to render invalid any provision in a policy of insurance issued by a company of another state doing business in Indiana restricting the time for commencing action to a period shorter than three years. No such restriction is imposed upon insurance companies organized under the laws of Indiana. It is appellant's contention that this statute so construed, applying only to foreign corporations, denies to such corporations the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States; that it is consequently invalid and cannot destroy the validity of the limitation in the bond. The question is presented by the ruling of the District Court overruling appellant's demurrer to the amended complaint and sustaining appellee's demurrer to the answer which affirmatively sets up the provisions of the bond and the invalidity of the Indiana statute in question.

The sole question presented by this record is whether or not Section 9139, Burns' Ann. Stat. of Indiana is a valid enactment, in the light of the 14th Amendment to the Constitution of the United States.

The section of Burns' Annotated Indiana Statutes, the validity of which is being attacked in this case, was passed by the Legislature of Indiana in 1865, before the 14th Amendment to the Constitution of the United States was adopted. It has been upheld as a valid exercise of legislative discretion by the Supreme Court of Indiana as affecting foreign insurance companies. American Surety Co. v. Pangburn, 182 Ind. 116, 119; Caywood v. Supreme Lodge, etc., 171 Ind. 410.

Another statute (Burns' Ann. Stat. 1926, § 9037) prohibits a life insurance company from incorporating a provision in a policy limiting the time within which any action at law or equity may be commenced to less than three years [fol. 6] after the cause of action shall accrue, and this provision has also been held valid by the Supreme Court of Indiana. Ins. Co. v. Brim, 111 Ind. 281; Caywood v. Supreme Lodge, etc., supra.

The writing of an insurance contract is not a transaction in commerce, nor is the insurance contract an article of commerce, but merely a simple contract of indemnity. Paul v. Virginia, 8 Wall. 168, 181; N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 502; National, etc. Ins. Co. v. Wanberg, 260 U. S. 71, 75.

The State of Indiana had the power to determine for itself the conditions upon which foreign insurance companies should be admitted to transact business in that state. It could have excluded them entirely, but permitting them to come into the state, it could determine upon what conditions they could transact business and make contracts, provided such conditions do not deprive such corporations of rights conferred upon them by the Constitution and Laws of the United States.

In discussing this Act, in Insurance Co. of North America v. Brim, 111 Ind. 281, the Supreme Court of Indiana said:

"While the general proposition may be conceded, that insurance companies have the right to contract that parties shall assert their claims against them within a reasonable time (Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386), yet

the constitutional right of the Legislature to prescribe the terms upon which foreign corporations may transact business within the State is also abundantly established. * * *.

"The statute must be regarded as a legislative declaration, that less than three years is an unreasonable limit within which to require parties holding claims under a policy of foreign insurance to assert their claims or be forever barred. This statute was in force when the contract of insurance was consummated, and it must be conclusively presumed that the contract was made with a due regard for the law. In so far as the statute and the condition in the policy are in conflict, the statute must prevail. It is said the statute is unconstitutional. Counsel have not called our attention to any provision of the Constitution which is supposed to be infringed, and we know of none."

The 14th Amendment to the Constitution of the United States provides:

"* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

[fol. 7] "Equal protection of the laws" means subjection to equal laws applying to all alike in the same situation, and it has consistently been held that states have the right to classify the subjects of legislation and make differences in regulations where substantial differences of condition exist. Phoenix Ins. Co. v. McMaster, 237 U. S. 63, 71; Fort Smith Light Co. v. The Paving District, 274 U. S. 387; Power Mfg. Co. v. Saunders, 274 U. S. 490.

Mr. Justice Day, speaking for the Supreme Court in Phoenix Ins. Co. v. McMaster, supra, used this language:

"* * * it was within the power of the State, so long as it did not impose upon the company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this court, and the Insurance Company, being within that class of companies not doing an interstate business, the State might, in the exercise of its lawful authority, exclude it from doing business within the State so long as no rights conferred by the

Constitution and laws of the United States were destroyed or abridged."

In the same case, in discussing "equal protection of the laws," the Court said:

"The equal protection of the laws, as this court has frequently decided, means subjection to equal laws applying alike to all in the same situation, or as expressed by Mr. Justice Field, speaking for this court in Barbier v. Connolly, 113 U. S. 27, 31—a case much relied upon by the plaintiffs in error—equal protection of laws means 'that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights. • • •. That no greater burdens should be laid upon any one than are laid upon others in the same calling and condition.' In this general definition, the court recognizes, as it always has, that what the equal protection of the law requires is equality of burdens upon those in like situation or condition. It has always been held consistent with this general requirement to permit the States to classify the subjects of legislation, and make differences of regulation where substantial differences of condition exist."

[fols. 8 & 9] The difference between a domestic insurance company and a foreign one is certainly substantial, and the only contention of appellant here is that the statute is void because it does not give to it the same rights and privileges that are given to insurance corporations created by the State of Indiana.

In discussing the power of the state to regulate and restrict the operations of a foreign insurance company, Mr. Justice Field, in Paul v. Virginia, supra, said:

"If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States • • •, and if • • • their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business

of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."

The statute in question having been enacted prior to the ratification of the 14th Amendment and having remained a part of the public policy of Indiana until now, it cannot be even suggested that the legislature had any design upon nullification of the 14th Amendment, but was attempting to establish a public policy for the State. We cannot say that when the legislature provided one set of regulations to control domestic insurance companies and another to control foreign insurance companies, the latter provisions applying uniformly to all corporations within the class, was arbitrary; but, upon the contrary, it was based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. Power Mfg. Co. v. Saunders, 274 U. S. 490.

The judgment of the District Court is affirmed.

[fol. 10] And on the same day to-wit: On the twelfth day of January, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, January 12, 1934.

Court met pursuant to adjournment and was opened by procla-tion.

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge

4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK

vs.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs, and interest from the date of the judgment of said District Court until paid, at the same rate that similar judgments bear in the courts of the State of Indiana.

[fol. 11] And afterwards, to-wit: On the thirtieth day of January, 1934, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is in the words and figures following, to-wit:

[fol. 11½] [Stamp:] Filed Jan. 30, 1934. Frederick G. Campbell, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1933, JANUARY SESSION, 1934

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant,

v.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company, Appellee

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Hon. Robert C. Baltzell, Judge

APPELLANT'S PETITION FOR REHEARING

James W. Noel, Hubert Hickam, Alan W. Boyd, Robert D. Armstrong, Indianapolis, Indiana, Counsel for Appellant. Charles D. Hunt, Sullivan, Indiana. Samuel D. Miller, Sidney S. Miller, Indianapolis, Ind., Counsel for Appellee.

[fol. 12] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1933, JANUARY SESSION, 1934

No. 4969

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, Appellant,

v.

KENNETH V. BROWNELL, as Receiver of the Peoples National Bank and Trust Company, Appellee

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Hon. Robert C. Baltzell, Judge

Appellant's Petition for Rehearing

The appellant, The Metropolitan Casualty Insurance Company of New York, respectfully presents this its petition for rehearing in the above-entitled cause, and submits as grounds therefor the following:

1. The court erred in affirming the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, in the above-entitled cause.

[fol. 13] 2. The court erred separately in overruling and denying each of the several assignments of error made by appellant in the above-entitled cause.

3. The court erred in holding that the provision of appellant's bonds requiring the commencement of an action within fifteen months after the presentation of a claim is rendered invalid by Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana General Assembly, 1865, p. 105).

4. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts of Indiana 1865, p. 105), as construed by the Supreme Court of Indiana, is a valid legislative enactment.

5. The court erred in holding that Section 9139, Burns' Ann. Stat. 1926 (Acts 1865, p. 105), does not deny to appellant the equal protection of the laws in violation of the

Fourteenth Amendment to the Constitution of the United States.

6. The court erred in impliedly holding that a statute enacted prior to the Fourteenth Amendment to the Constitution of the United States would remain valid after the adoption of said amendment if in conflict therewith.

7. The court erred in impliedly holding that the validity of a statute, if in conflict with the Fourteenth Amendment to the Constitution of the United States, would be affected by any intention or lack of intention on the part of the State to nullify the amendment.

[fol. 14] 8. The court erred in holding that there is a real and substantial difference between a foreign insurance company admitted to do business in the state of Indiana and a domestic insurance company of said state having any reasonable relation to the subject of the legislation in question. (Section 9139, Burns' Ann. Stat. 1926, Acts 1865, p. 105, of the General Assembly of Indiana.)

Wherefore, appellant prays the court for a rehearing in said cause and that the judgment of the District Court be in all things reversed and for all other proper relief.

James W. Noel, Hubert Hickam, Alan W. Boyd, Robert D. Armstrong, Counsel for Appellant.

[fol. 15] And afterwards, to-wit: On the twenty-eighth day of February, 1934, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 28, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Louis FitzHenry, Circuit Judge

4969

METROPOLITAN CASUALTY INSURANCE COMPANY

vs.

KENNETH V. BROWNELL, as Receiver, etc.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the first day of March, 1934, the following further proceedings were had and entered of record, to-wit:

Thursday, March 1, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before Hon. Evan A. Evans, Circuit Judge

[fol. 16] 4969

METROPOLITAN CASUALTY INSURANCE COMPANY

vs.

KENNETH V. BROWNELL, as Receiver, etc.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Now this day comes counsel for appellant and presents a motion for a stay of the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellant may proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

[fol. 17] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 16, inclusive, contain a true copy of the proceedings had and papers filed, excepting briefs of counsel, and order relating to the filing of briefs, and the answer to the petition for rehearing, in the case of The Metropolitan Casualty Insurance Company of New York, Appellant, vs. Kenneth V. Brownell, as Receiver of the Peoples National Bank and Trust Company, Appellee, No. 4969, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of March A. D. 1934.

Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal United States Circuit Court of Appeals, Seventh Circuit.)

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5080-C)